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In the Supreme Court of the United States

OCTOBER TERM, 1995

BRIAN J. DEGEN, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The court of appeals disentitled Brian Degen from defending the civil forfeiture of his property because “he had been indicted in Nevada but refused to return” to the United States to face the criminal charges against him. Pet. App. 5a. The court acknowledged (*id.* at 8a n.2) that the seizure of petitioner’s property was flatly unconstitutional under *United States v. James Daniel Good Real Property*, 114 S. Ct. 492 (1993). And it did not dispute that petitioner might well have (as indeed he does) several other powerful defenses to the civil forfeiture. None of this mattered, the panel held, because petitioner’s failure to “submit to” the district court’s “jurisdiction in the *criminal action*” (Pet. App. 5a (emphasis added)) was sufficient to bar him from offering any defense to this *civil* forfeiture action.

We restate the court of appeals’ decision because the government evidently has no desire to defend it on its own terms. Thus, notwithstanding the government’s elaborate argument on the point (Br. 16-18), the courts below *never* found — indeed, they never even intimated — that petitioner’s “fugitivity” in his criminal case had the slightest impact on the civil forfeiture proceedings. And that should hardly be surprising, since until its filing in this Court the government never made any such suggestion itself. In any event, the government’s after-the-fact effort to fortify the decision below misapprehends this Court’s disentitlement cases, conflicts with fundamental principles of due process, depends on an excessively broad concept of “fugitivity,” and arrogates to the federal courts a supervisory power of unprecedented breadth and intrusiveness.

1. The Government’s Defense Of The Decision Below Cannot Be Squared With This Court’s Disentitlement Cases

a. The government does not dispute that this Court has *never* applied the disentitlement doctrine outside the confines of criminal appeals. Nor does it deny that in each of this Court’s cases the doctrine was applied in the *very proceeding* in which the appellant had become a fugitive; that in none of the cases was the doctrine applied *in derogation of constitutional rights*; that in each case the disentitled person was a “fugitive” in the *ordinary sense of the word* — a person who had either escaped from custody or

jumped bail; and that in each case the fugitive was seeking affirmative relief from the Court (reversal of a conviction).¹

There is thus no mistaking the government's intentions in this case: it wants a bold departure from this Court's long line of disentitlement cases. To that end, the government argues (Br. 16) that the purposes of the disentitlement doctrine would be equally well served by extending it to this quite different context. But the government misapprehends what those purposes are. As we explained in our opening brief (at 12-17), the disentitlement doctrine, as explicated in *Ortega-Rodriguez*, is designed to address (1) the inability of the disentitling court to enforce an unfavorable judgment against a fugitive; (2) the interest in efficient judicial practice; (3) the need to protect the "dignity" of the disentitling tribunal; and (4) the need to deter fugitives from taking flight in the first place. For the reasons we stated in our brief, none of those purposes is served by invoking the doctrine against an owner seeking to defend against the confiscation of his property.

¹ This Court's disentitlement cases uniformly "concern[] the situation in which a fugitive * * * is the party seeking review * * *." *United States v. Sharpe*, 470 U.S. 675, 681 n.2 (1985). Although the government insists that this distinction is irrelevant (Br. 26), and that it amounts to no more than "a description of the facts of this Court's cases" (Br. 43), it does not explain why that is so. Nor does it account for the Court's pointed refusal in *Sharpe* (470 U.S. at 681 n.2) to extend the disentitlement doctrine beyond the context in which the fugitive has "call[ed] upon this Court for a review of his conviction."

Alternatively, the government contends that petitioner was in fact seeking "affirmative relief" because he did not seek merely to challenge the government's showing of probable cause, but also sought to interpose affirmative defenses and to conduct discovery. Br. 26-27. That is a distinction without a difference. After all, the claimant in *Societe Internationale v. Rogers*, 357 U.S. 197 (1958), also raised defenses to the forfeiture (see *id.* at 199) and sought discovery assistance from the trial court (see *id.* at 203). Nevertheless, this Court held (*id.* at 210) that the claimant, "though cast in the role of plaintiff, cannot be deemed to be in the customary role of a party invoking the aid of a court to vindicate rights asserted against another. Rather [its] position is more analogous to that of a defendant, for it belatedly challenges the Government's action by now protesting against a seizure and seeking a recovery of assets."

The government contends otherwise, but only by radically reformulating the purposes articulated by this Court in *Ortega-Rodriguez*. For example, the government asserts (Br. 17) that petitioner's "physical absence while seeking to prevent the forfeiture immunizes him from the enforcement of discovery obligations and keeps him beyond the reach of the court's usual process for supervising discovery and compelling attendance at hearings." Accordingly, the government surmises (*ibid.*), the "enforceability concern" underlying the disentitlement doctrine justifies applying the doctrine in this case. But the government misconceives what "the enforceability concern" is. As the Court explained in *Ortega-Rodriguez*, that goal focuses on whether the judgment of the disentitling court can be enforced. Thus, in *Ortega-Rodriguez* itself, the Court declined to order disentitlement because a "defendant returned to custody before he invokes the appellate process presents no risk of unenforceability; he is within the control of the appellate court throughout the period of appeal and issuance of the judgment." 113 S. Ct. at 1206. As the government is constrained to admit, the same holds true here: "the court has control over the res and therefore may enforce any eventual judgment" (Br. 17).

The government likewise misconstrues what *Ortega-Rodriguez* meant by protecting the "dignity" of the disentitling tribunal. In its view, the disentitlement doctrine "protects the orderly functioning of the court, * * * not the 'dignity' of a particular case." Br. 19 (emphasis in the original). Accordingly, the government reasons, because the criminal case and the civil forfeiture are both pending in the same district court, that court's dignity is affronted even if petitioner's "fugitivity" affected only the criminal proceeding. The government therefore devotes much of its brief (Br. 18-25) to cataloguing the respects in which petitioner's failure to come to the United States has impaired the criminal prosecution.

But the government begins with a false premise: the disentitlement doctrine does, to be sure, protect the dignity of a court, but only with respect to a particular case. *Ortega-Rodriguez* could hardly have made the point more plainly. The Court declined to disentitle the defendant in that case because his flight "ha[d] no connection to the course of the appellate

proceedings" (113 S. Ct. at 1207 (emphasis added)). "Absent some connection between a defendant's fugitive status *and his appeal*, *** the justifications advanced for dismissal of fugitives' pending appeals generally will not apply" (*id.* at 1208 (emphasis added)). Thus, even were the government correct in saying that petitioner's "fugitivity" impaired his *criminal* case (Br. 18-25), that simply could not justify disentitling him in the *forfeiture* proceeding.

When the government turns to the next purpose of the disentitlement doctrine — the interest in efficient judicial practice — it is once more on shaky ground. Indeed, much of the government's argument in this regard should not be countenanced at all, since it was never raised below. For example, the government hypothesizes a variety of ways in which — had petitioner not been disentitled — his alleged fugitivity might have "impair[ed] the orderly and expeditious litigation of the *civil* forfeiture action" (Br. 16 (emphasis added)). But the government never made any such claim below, even though *Ortega-Rodriguez* was decided some five months before the amended final judgment in the district court (Pet. App. 32a-37a) and more than 21 months before the argument in the court of appeals (*id.* at 1a). Not surprisingly, the lower courts did not find (or even suggest) that petitioner's "fugitivity" had an adverse impact on the *civil* forfeiture proceedings. Still less did either of the lower courts conclude that disentitlement would be a "reasonable" solution to any such disruption of the forfeiture proceedings. *Ortega-Rodriguez*, 113 S. Ct. at 1205. See *Thomas v. Arn*, 474 U.S. 140, 146-148 (1985).

Finally, the government says nothing at all about the deterrence rationale articulated by *Ortega-Rodriguez*. It concedes by its silence that a "fugitive" who has simply failed to travel to the United States to stand trial has not committed any offense against the disentitling court at all. Failing to come to the United States, even with knowledge of a pending indictment, is simply not an offense — much less the kind of offense that this Court has ever sought to deter by applying the disentitlement sanction.

b. In sum, none of the rationales identified in *Ortega-Rodriguez* applies here. But even if those rationales could be recast in the way the government suggests, none would warrant the

"blunderbuss of dismissal" (*Ortega-Rodriguez*, 113 S. Ct. at 1207). Certainly the merely hypothetical prospect that petitioner may one day disobey a court order in the forfeiture case is no reason to invoke disentitlement. No claimant — not even an alleged "fugitive" — is "immunize[d] *** from the enforcement of discovery obligations" (U.S. Br. 17). In the event that a claimant fails to comply with a particular court order, the court has a wide range of sanctions at its disposal — including, as the government itself points out, such less drastic alternatives as "'striking pleadings, assessing costs, [and] excluding evidence'" (Br. 13, quoting *International Union v. Bagwell*, 114 S. Ct. 2552, 2560 (1994)). If, and when, a claimant becomes non-compliant, a "district court can tailor a more finely calibrated response"; it need not, and should not, invoke disentitlement at the outset. *Ortega-Rodriguez*, 113 S. Ct. at 1207.

Moreover, the government's assumption that petitioner would, if allowed to defend, "affront *** the dignity of the court's proceedings" (Br. 18), is unwarranted. The government bases that assumption on the fact that petitioner sought to have his deposition taken in Switzerland and to limit the scope of the government's questions. Br. 18. Significantly, petitioner had already been disentitled by the time this deposition was noticed (see Pet. App. 17a-26a), and thus any "effrontery" presented by the deposition had no bearing on the trial court's disentitlement decision. In any event, there is nothing remotely unusual, let alone contumacious, about asking that depositions of foreign nationals be conducted in their country of residence. Fed. R. Civ. P. 28(b) expressly authorizes depositions in foreign countries; and as the government concedes (Br. 5), the trial court in fact *ordered* that petitioner's wife be deposed in Switzerland. See Pet. C.A. App. 540. It is hard to believe that the trial judge nevertheless regarded the request for a foreign deposition as an "affront" to its dignity.

Nor did petitioner's effort to narrow the scope of deposition questioning constitute effrontery of any sort. Litigants, including the government, seek restrictions on the scope of discovery all the time. See, e.g., *Tavoulareas v. Piro*, 93 F.R.D. 11, 23-24 (D.D.C. 1981). That is the very purpose of Fed. R. Civ. P. 26(c)(4), which authorizes courts to issue protective orders ensuring that "certain matters not be inquired into, or that the

scope of the disclosure or discovery be limited to certain matters." And it is hardly surprising that a claimant in a forfeiture proceeding who is also a defendant in a criminal action would seek to limit the scope of questioning.²

The government insists (Br. 18), however, that petitioner's "refusal to submit to the authority of the district court to try him for his crimes unmistakably conveyed to that court that he would comply with its process only as he saw fit, and that he would use his foreign residence as a shield against any coercive sanctions for noncompliance." It is odd, to say the least, that petitioner "unmistakably conveyed" that message and yet the trial court failed to hear it; no doubt the government's failure to raise the point below had something to do with that. In any case, the usual practice is to wait until a litigant actually abuses the process before punishing him for doing so. Should petitioner someday decline to comply with a court order — and to date he never has — the trial court will have ample opportunities for enforcement, not least of all because it retains complete control over the property itself.

c. The government argues at length (Br. 18-25) that petitioner's disentitlement in the civil proceedings is justified, at

² Indeed, the Department of Justice has openly encouraged prosecutors to seek depositions of forfeiture claimants precisely to compromise their rights against compulsory self-incrimination (U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Assistance, *Civil Forfeiture: Tracing the Proceeds of Narcotics Trafficking*, November 1988, addendum January 1992, at 2-3):

The claimant may be deposed and disclosure of his records compelled * * *. And, while the Fifth Amendment may still be asserted, a civil claimant risks an adverse factual finding by doing so. This possibility places the claimant in a particular bind if criminal charges against him are still pending. Asserting the Fifth Amendment may result in an adverse factual determination, while answering questions may have incriminating consequences in the criminal proceedings. * * *

For these reasons, the civil claimant is in a very difficult position relative to his posture in a criminal trial * * *. This means that, even when tracing obstacles exist, forfeiture proceedings should be considered, since the government may never be put to its proof.

least in part, because his "fugitivity" impaired the criminal proceedings. As we noted above (at 3-4), under *Ortega-Rodriguez* a fugitive cannot be disentitled in one proceeding because his fugitivity may have affected an entirely different proceeding. And the government offers no persuasive reason to abandon this sensible limitation on the disentitlement doctrine.

For example, making a virtue of necessity, the government argues (Br. 19) that "pretrial fugitivity imposes significantly greater burdens on the administration of criminal justice than does fugitivity that occurs after trial." In particular, it says, a pretrial fugitive "grant[s] himself an indefinite continuance" (Br. 19) and a "self-help severance" (Br. 20). But even were that true — and it is not³ — the sanction of disentitlement in a separate civil litigation would hardly be appropriate. As the Court explained in *Ortega-Rodriguez*, disentitlement is always a "*sanction* [in the form of] dismissal." 113 S. Ct. at 1207 (emphasis added). That is particularly true where, as here, the underlying proceeding — a civil forfeiture — is itself punitive by nature. See *Austin v. United States*, 113 S. Ct. 2801, 2810-2812 (1993). Disentitlement is thus appropriately reserved only to fugitives who actually deserve to be *punished* — specifically, persons who abscond following conviction of a crime. As we noted in our opening brief (at 35), every one of this Court's disentitlement cases involved precisely such defendants. There is no reason to extend the doctrine more broadly and every good reason not to.

Nor can disentitlement be justified because the government fears that the "fugitive" will obtain discovery in the forfeiture proceeding that enables him to "circumvent[the] limitations on criminal discovery" (Br. 22). The government's concerns are ironic, to say the least, since the government itself routinely uses

³ As a technical matter, a district court does not even have jurisdiction over a defendant who remains abroad after indictment; the government conceded that very point at oral argument in the court of appeals. See Pet. Br. 16 n.11. Nor has the government been deprived, as a practical matter, of the opportunity to prosecute petitioner, since as it now admits (Br. 43-44) the United States has prevailed upon the Swiss to arrest, incarcerate, and prosecute petitioner on the very same charges it filed here.

civil forfeiture proceedings as a means of "circumventing" the restrictions on the Fifth Amendment. See page 6 n.2, *supra*. And in the present case, those concerns are misplaced: the prosecutor specifically told the district court that there was "no need for any further secrecy" with regard to the parallel criminal case, and the trial court accordingly ordered that discovery on behalf of Karyn Degen go forward. 2/1/93 Tr. 14, 36. What is more, petitioner seeks to raise a variety of defenses in the forfeiture proceeding that may require virtually no discovery at all — including that the seizure violated this Court's decision in *James Daniel Good*; that the forfeiture is time-barred; and that parts of the action violate the Ex Post Facto Clause.⁴ Should discovery nevertheless stray too close to the government's criminal case, the government may seek a protective order forbidding certain lines of inquiry. And in the event of "contrived or perjured testimony" (U.S. Br. 24) in the criminal case, the trial judge would have a variety of sanctions available to it. See *United States v. Dunnigan*, 113 S. Ct. 1111 (1993) (defendant's sentence may be enhanced because of perjury

⁴ The government asserts (Br. 34-35 & nn.18-19) that these defenses are likely to fail. We disagree. While the statute of limitations does indeed run from the date of discovery, the government's own submissions — as we noted in our opening brief (at 31-32) — strongly suggest that the government "discovered" petitioner's alleged offenses at least 20 years ago, when it says it began investigating him. J.A. 11. Similarly, while the government purports (Br. 35 n.19) to have evidence of narcotics violations occurring after the effective date of the two forfeiture provisions on which it relied, very little of that evidence relates to the *specific properties* that the prosecutors sought to forfeit. See J.A. 10-28, 135-161. Finally, the government contends (Br. 34-35) that petitioner was in "privity" with his wife (whose claim was denied) and would therefore be estopped on remand from defending the forfeiture action. That is not so. Petitioner was disentitled from defending this case long before the district court adjudicated Karyn Degen's claims. Pet. App. 17a-26a, 30a-31a. Because petitioner therefore lacked "a full and fair opportunity to litigate," he cannot be bound by the judgment rendered against his wife. *Montana v. United States*, 440 U.S. 147, 153 (1979); 1B *Moore's Federal Practice* ¶ 0.411[1], at III-210 (1995) (persons cannot be bound by a judgment absent "an opportunity to be heard in opposition").

at trial). None of these hypothetical concerns, however, authorizes federal courts to deprive a forfeiture claimant of his day in court.

2. The Government's Defense Of The Decision Below Cannot Be Squared With Principles Of Due Process

In addition to departing fundamentally from this Court's disentitlement cases, the decision below abridged petitioner's due process rights to a hearing and to present a defense. The government acknowledges that those constitutional rights are implicated here, but contends that disentitling petitioner did not violate either due process protection. Br. 27-34.⁵

a. The government first points out (Br. 28) that the Due Process Clause entitles a claimant only to the "opportunity" for a hearing, and not necessarily to an actual hearing. Accordingly,

⁵ The government also contends (Br. 29-30) that there is no meaningful difference between depriving a forfeiture claimant of *any* hearing and, as in this Court's disentitlement cases, depriving a defendant merely of the right to appeal a criminal conviction. In the latter context, the government states, the appellant is likewise claiming that he has been denied "a fair hearing"; thus, the government reasons, if due process permits a fugitive to be disentitled from appealing a criminal conviction, so too does it permit a district court to disentitle a fugitive from defending a forfeiture. The analogy is flawed. The fugitive who is disentitled from defending against a forfeiture gets no hearing at all, whereas the convicted criminal has at least had his day in court (however imperfect). See *National Union of Marine Cooks and Stewards v. Arnold*, 348 U.S. 37, 42-43 (1954) (distinguishing, for due process purposes, between the sanction of dismissal at the trial stage, where a litigant has at least "had its day in court," and the denial merely of "a statutory review"). More critically, the convicted criminal has no constitutional right to appeal at all. "An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal." *McKane v. Durston*, 153 U.S. 684, 687 (1894). Rather, "the right to a judgment from more than one court is a matter of grace" (*Cobbedick v. United States*, 309 U.S. 323, 325 (1940)), and "is wholly within the discretion of the State to allow or not to allow" (*McKane*, 153 U.S. at 687). By contrast, a person who has been disentitled from defending against the taking of his property has been deprived of a bedrock right to due process.

the government reasons (*ibid.*), “a court may dismiss a case, or enter a default judgment, for noncompliance” with reasonable procedural rules. But in each and every case cited by the government, the “‘procedural requirements’” (*ibid.*) at issue were designed to promote the efficiency and orderliness of *the very case itself*. See *Boddie v. Connecticut*, 401 U.S. 371 (1971) (time limitations); *United States v. Kras*, 409 U.S. 434 (1973) (filing fees); *Hammond Packing Co. v. Arkansas*, 212 U.S. 322 (1909) (orders to produce evidence). By contrast, in *McVeigh v. United States*, 78 U.S. (11 Wall.) 259 (1871), the Court invalidated a court order that struck a property owner’s claim because of actions he had taken outside the confines of the case itself.

Indeed, it is highly doubtful that federal courts have any “supervisory power” to create a rule disentitling a litigant in one case because of actions he may have taken in another case. Under Fed. R. Civ. P. 83, federal district courts are authorized to devise local rules to regulate “their practice.” In *Ortega-Rodriguez*, this Court construed substantially identical language in Fed. R. App. P. 47 to require a connection between appellate sanctions and “the appellate process” (113 S. Ct. at 1206 n.15) — and not just the “appellate process” in general, but the appellate process in the very case itself (see *id.* at 1207-1208). Under Rule 83, therefore, a court must tailor its local rules to the needs of the particular case, but not some other case. The disentitlement doctrine may not be applied in derogation of that limitation. Cf. *Lonchar v. Thomas*, 64 U.S.L.W. 4243, 4247-4250 (U.S. Apr. 1, 1996) (courts may not dismiss federal habeas corpus petitions for “equitable” reasons that depart from relevant statutes and Rules); *Bank of Nova Scotia v. United States*, 487 U.S. 250, 255 (1988) (“The balance struck by the Rule between societal costs and the rights of the accused may not be casually overlooked because a court has elected to analyze the question under the supervisory power.”) (internal quotations omitted).⁶

⁶ Although the government — in a surprisingly robust defense of the supervisory powers of the federal courts — contends that courts have “a sizeable reservoir of authority *** to manage [their] civil dockets aggressively” (Br. 13 (internal quotations omitted)), the fact remains that in each of the cases it cites the exercise of supervisory power was

Nor is the government correct when it analogizes (Br. 29-30) the disentitlement doctrine to waiver principles. Even if a claimant could waive his right to defend his property without committing a “voluntary, knowing act” (Br. 29), surely he must do, or fail to do, *something* in the case itself to waive his rights. The government cites no case, and we know of none, in which a party’s actions or inactions in *one* case were held to waive his due process rights in *another* case.⁷

b. The government also insists (Br. 30-34) that disentitling petitioner did not abridge what it calls his “absolute ‘right to defend’” the forfeiture. Of course, that is a strawman to begin with; we never contended that the right to defend is “absolute.” But it *is* an aspect of due process, and as such can be restricted only in a manner consistent with the Due Process Clause.

The order disentitling petitioner does not meet that test. As we noted in our opening brief (at 24-27), the decision below cannot be squared with this Court’s decisions in *McVeigh v. United States*, 78 U.S. (11 Wall.) 259 (1871), and *Windsor v. McVeigh*, 93 U.S. 274 (1876). There, the Court made clear that even an act of consummate effrontery — participating in a rebellion — did not permit a court to deny an owner the right to defend against the

designed to promote the orderly and efficient litigation of *the very case in which the power was exercised*. Whether the supervision was invoked “to compel the appearance and testimony of witnesses,” *Shillitani v. United States*, 384 U.S. 364, 370 (1966), to ensure “compl[iance] with document discovery,” *International Union v. Bagwell*, 114 S. Ct. 2552, 2560 (1994), or generally to curb the “full range of litigation abuses,” *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46 (1991) — in each case the purpose was to facilitate the very litigation itself. See also *Ortega-Rodriguez*, 113 S. Ct. at 1207 (“We cannot accept an expansion *** that would allow an appellate court to sanction by dismissal any conduct that exhibited disrespect for any aspect of the judicial system ***.”).

⁷ It may be added that even the court below acknowledged that the seizure of petitioner’s property violated his due process rights under *James Daniel Good*. The government does not even cite the *Good* case in its brief, much less explain how petitioner waived his due process rights under that case as well.

confiscation of his property.⁸ Nor can petitioner's disentitlement be reconciled with *Hovey v. Elliott*, 167 U.S. 409 (1897), in which the Court reiterated that "due process of law signifies a right to be heard in one's defense" (*id.* at 417).

Hammond Packing Co. v. Arkansas, 212 U.S. 322 (1909), on which the government relies (Br. 32-34), is not to the contrary. The trial court in that case struck an answer after the defendant had refused to obey an order requiring the production of documents and witnesses. Sustaining the judgment, this Court explained that whereas the sanction in *Hovey* was "a mere punishment" (*id.* at 350), the striking of the answer in *Hammond Packing* resulted from "the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense" (*id.* at 351).

Hammond Packing, in short, stands only for the proposition that litigants can take (or fail to take) steps *in the litigation itself* that warrant a presumption that their claims are meritless. As the Court has made clear in subsequent cases, however, "[d]ue process is violated * * * if the behavior of the defendant will not support the *Hammond Packing* presumption." *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 706 (1982). In the present case, petitioner was sanctioned, indeed dispositively sanctioned, not because of anything he did or failed to do in the forfeiture proceeding, but instead because of his failure to come to the United States to stand trial in a separate criminal case. For all the reasons we have noted, the latter

⁸ The government suggests (Br. 31) that in neither of the *McVeigh* cases was there an "allegation * * * that the claimant had indicated his intention to appear on his own terms, or that the court's ability to function fairly and efficiently had been impaired in any respect by acts or omissions over which he could fairly be deemed to have control." But there was no such "allegation" in the present case either, at least until the government submitted its brief to this Court. In any event, any such allegation would be groundless: petitioner has *not* "indicated" to the forfeiture court that he will disobey its orders; and the trial court did not identify any way in which its "ability to function" had been impaired by petitioner's "acts or omissions."

"behavior" simply does "not support the *Hammond Packing* presumption." *Ibid.*⁹

3. The Government's Defense Of The Decision Below Requires An Unwarranted And Inappropriate Expansion Of The Meaning Of "Fugitive"

Even if this Court concludes that property owners may be "disentitled" in civil forfeiture actions from defending their property against confiscation by the United States government, the Ninth Circuit's decision should be reversed because, as explained in our opening brief (at 34-43), petitioner does not qualify as a "fugitive" for two independent reasons. *First*, he has never been a "fugitive" within the ordinary meaning of that term (or even the more specialized meaning that has developed in analogous legal contexts). Petitioner has not fled from the custody of any court in which he was convicted of a crime; has not otherwise absconded or taken flight from U.S. authorities in violation of any criminal proscription; and has not even departed this country with any intent to avoid prosecution. *Second*, even if petitioner once was a fugitive from U.S. prosecutors, he is no longer. As the government belatedly acknowledged in this Court (Br. in Opp. 16-17 & nn.10-11 (emphasis added)), petitioner was arrested by Swiss authorities and is currently being prosecuted by them — all "*at the request of the United States and based principally on the conduct that formed the basis for the U.S. indictment.*" The government's efforts nevertheless to maintain that petitioner remains a fugitive subject to disentitlement are wholly unpersuasive.

a. The government concedes (Br. 42-43) that every one of this Court's disentitlement cases has involved "fugitives" who broke out of prison or otherwise escaped from lawful custody (actual or constructive) following a criminal trial and conviction. And it does not dispute that the flight in each of those cases was "a deliberate and *unlawful* flouting of the convicting court's authority to execute its judgment." Pet. Br. 35 (emphasis added).

⁹ At a minimum, the serious due process concerns we have identified provide a compelling prudential reason not to extend the disentitlement doctrine beyond the confines of criminal appeals to civil forfeiture actions. Cf. *NLRB v. Catholic Bishop*, 440 U.S. 490, 499-501 (1979).

The government nevertheless urges this Court to endorse a vastly expanded concept of “fugitivity” that would encompass persons who merely are absent from the United States while a criminal charge is pending here against them. That expansive definition departs from the ordinary meaning of the word “fugitive” and rests on a line of *extradition* cases that is plainly inapposite. More critically, the government’s broad concept of “fugitive” bears no relationship to the lawful purposes of the disentitlement sanction.

The government relies heavily on concepts drawn from the law of interstate extradition. Br. 37-38 & n.21. As the government correctly notes, the extradition statute (18 U.S.C. § 3182) — which implements the Extradition Clause of the Constitution (U.S. Const. art. IV, § 2, cl. 2) — “has been held consistently to require only proof of absence from the indicting jurisdiction, regardless of the defendant’s intent.” *United States v. Marshall*, 856 F.2d 896, 898 (7th Cir. 1988). But as this Court has explained, “[t]he language, history, and subsequent construction of the Extradition Act make clear that Congress intended extradition to be a summary procedure.” *California v. Superior Court of California*, 482 U.S. 400, 407 (1987). The summary nature of interstate extradition proceedings, and the special definition of “fugitive from justice” that has developed in that context, reflect the unique concerns and history underlying the Extradition Clause. As the Court explained in *Appleyard v. Massachusetts* (203 U.S. 222, 227-228 (1906) (emphasis added)):

The constitutional provision relating to fugitives from justice, as the history of its adoption will show, is in the nature of a *treaty stipulation* entered into for the purpose of securing a prompt and efficient administration of the criminal laws of the several States * * *. A faithful, vigorous enforcement of that stipulation is vital to the harmony and welfare of the States.

The Framers correctly recognized that the federal government “must fail unless the States mutually supported each other and the General Government; and that nothing would be more likely to disturb its peace, and end in discord, than permitting an offender against the laws of a State, by passing over a mathematical line which divides it from another,” to avoid prosecution, and “stand ready, under the protection of the State, to repeat the offence as soon as another opportunity offered.” *Superior Court of*

California, 482 U.S. at 406 (internal quotations omitted). The Court accordingly rejected the argument that extradition could be challenged on the ground that the person sought to be extradited lacked a subjective belief that he had violated the demanding State’s laws at the time of departure. *Appleyard*, 203 U.S. at 226.

These considerations have no relevance whatsoever in the disentitlement context. Disentitlement, unlike extradition, is a “sanction” aimed at deterring wrongful conduct that directly interferes with the disentitling court’s processes. For that reason, the definition of “fugitivity” employed in the disentitlement context must include some element of culpability or wrongful conduct. Mere absence from the United States, even when coupled with actual knowledge of pending charges (a factor that evidently is not required under the government’s proposed definition), hardly qualifies as conduct warranting the sanction of disentitlement, much less the multimillion dollar penalty exacted in this case. Nor does disentitlement of an absent foreign property owner serve any deterrent function when the owner is unaware of the pending charges, or has left the country without any intent to avoid prosecution. In short, the government’s proposed definition is not — as the government concedes it must be (Br. 43) — “informed by the purposes of th[e disentitlement] doctrine.”¹⁰

In sharp contrast to the extradition cases, the three criminal statutes cited and discussed in our opening brief (at 37-39) are analogous to the disentitlement doctrine because they target conduct meriting sanction and, according, do provide guidance on the appropriate definition of fugitivity. The government does not dispute that the Felony Fugitive Act, 18 U.S.C. § 1073, requires proof of flight with an intent to avoid prosecution or custody, or that mere absence is insufficient to violate the statute. Br. 41. Nor does the government explain (see Br. 42 n.23) why the definition of “fugitive from justice” Congress included in the

¹⁰ As explained in our opening brief (at 36-37 & n.20), the ordinary meaning of the word “fugitive” does not include mere absence plus failure to return. The several dictionaries cited by the government (Br. 36, 42) do not disprove this point. Moreover, to the extent they suggest a broader definition of “fugitivity,” they merely acknowledge the special definition applicable in the extradition context.

federal firearms law (see Pet. Br. 37), should somehow be regarded as a departure from ordinary legal usage. And the federal tolling provision applicable to fugitives from justice, 18 U.S.C. § 3290, clearly *does* provide a useful analogy. As the government concedes (Br. 40), under that statute “most courts of appeals have required that the government establish that the defendant intended to avoid prosecution.”¹¹

Finally, we note that the government does not dispute our contention (Pet. Br. 40-41) that it never even argued in the lower courts that petitioner left the United States with any intent to avoid prosecution, much less carried its burden of submitting evidence that would show such intent. See U.S. Br. 43 n.24. For that reason, if the Court agrees with any of our proposed definitions of “fugitivity,” it can and should simply reverse the judgment.

b. The government fares no better in arguing that petitioner remains a “fugitive” from United States prosecutors today even though they concededly have procured his arrest and ongoing prosecution by Swiss authorities based on the very same conduct (and charges) that underlie the U.S. indictment.

The government renews its assertion that petitioner is to blame for the lack of evidence in the record to demonstrate a fact whose truth the Solicitor General has now admitted (U.S. Br. in Opp. 16-17): that the United States succeeded in “transfer[ring] to Switzerland * * * the prosecution of Brian John Degen on the federal United States charges for which he was indicted in the District of Nevada.” Pet. Br. 1a; *id.* at 3a (“[W]e formally requested that the prosecution be taken over by Switzerland.”).¹²

¹¹ The government contends (Br. 40) that “every court of appeals” would allow such intent to be inferred from an absent property owner’s failure to return to the United States once he learned of charges pending against him. That is mistaken. Only the Second Circuit has endorsed the concept advocated by the government, which it refers to as “constructive flight,” and which it has described as “concededly without precedent.” *Jhirad v. Ferrandina*, 536 F.2d 478, 483 (2d Cir.), cert. denied, 429 U.S. 833 (1976).

¹² The government also contends (Br. 44) that we “disclaimed” this argument in our reply brief at the petition stage. Not so. In fact, our

Without explaining why his previous admission does not foreclose this argument, the Solicitor General contends (Br. 44-45) that petitioner was remiss in failing to ask the “district court [to] reconsider its disentitlement ruling” in the seven months between his arrest in Switzerland in November 1992 and the district court’s entry of its order of forfeiture in June 1993. See Pet. App. 30a-37a. According to the government, because “petitioner does not allege that the government * * * did anything that affirmatively prevented him from making that request,” he must bear the blame for the state of the record. Br. 45.

The government’s argument rests on a false premise. As we previously explained (Pet. Br. 46; Reply Br. 10 n.8), we do maintain that government counsel misled *the district court* concerning the United States’ role in the Swiss proceedings, and that those misrepresentations not only lulled petitioner into not pursuing the matter further but also persuaded the district court that the United States was simply not involved in petitioner’s arrest in Switzerland.¹³ Had the government been candid with the

reply brief expressly stated that petitioner, at the merits stage, might “elect[] to make” the very argument the government says we abandoned. Reply Br. 10. Our reply brief also stated that this Court could “decline to consider” this argument “on the merits” if the Court agreed with the government’s submission that petitioner was to blame for a record that was “factually and legally inadequate” on this issue. These statements, which the government overlooks, are hardly consistent with “disclaiming” the argument.

¹³ On January 6, 1993, the lawyer representing petitioner and his wife filed an affidavit stating that petitioner’s Swiss lawyer had glimpsed a letter in petitioner’s criminal dossier in Switzerland indicating that the United States government had urged the Swiss authorities to initiate a criminal action against Degen. J.A. 162-164. In response to this allegation, the United States Attorney told the district court that this account of “the circumstances surrounding the arrest and detention of Brian DEGEN by Swiss authorities * * * is little more than a literary flight of fancy.” J.A. 167. At a February 1, 1993 hearing, the government’s lawyer stated that petitioner’s “unavailability” as a consequence of his incarceration in Switzerland “should not in any way be blamed on the government in this case.” Pet. Br. 7a; Pet. Br. 46.

district court, there is little doubt that petitioner would have raised this argument in the district court (as he did in the Ninth Circuit). Any defect in the record is thus directly attributable to the actions of the government.¹⁴

Moreover, in view of the government's admission concerning its actual role in the Swiss prosecution, there is no need to remand for a determination of a fact whose truth the government concedes. Instead, assuming the disentitlement doctrine is *ever* applicable in civil forfeiture proceedings, on the present record the Court can and should decide the question whether petitioner falls within the appropriate legal definition of a "fugitive." On the merits of *that* issue, the government has nothing persuasive to say. It merely asserts (Br. 45) that petitioner has not indicated that he would return to the United States if released from Swiss custody. That is true but irrelevant: the pertinent issue is the legal significance of the Swiss custody and prosecution, not whether petitioner will or will not travel to the United States to stand trial. In sum, the government does not explain, nor can it, how petitioner could possibly be regarded as a fugitive from United States prosecutors when he is currently being prosecuted in Switzerland, at the behest of those very prosecutors, "on the federal United States charges for which he was indicted in the District of Nevada" (Pet. Br. 1a).

4. The Government Has Not Refuted Our Showing That The Prosecutors In This Case Forfeited The Right To Invoke The Equitable Doctrine Of Disentitlement

The government acknowledges (Br. 45-46 (footnote omitted)) that "before the lower courts, the government's briefs did not appropriately set forth the full factual background of the

And, at the close of that hearing, when Judge Reed remarked that he was "not impressed by the representations that the United States government caused [the Swiss] criminal charges to be pressed against [petitioner]" (Pet. Br. 8a), the government's lawyer pointedly failed to speak up and correct the record. See also Pet. C.A. App. 20, 35.

¹⁴ Contrary to the government's suggestion (Br. 44-45), petitioner obviously cannot be faulted for not bringing to the district court's attention the activities of the Swiss magistrate in Nevada that occurred *after* the district court entered its order of forfeiture.

government's role in urging Swiss authorities to prosecute petitioner."¹⁵ It contends, however, that for two reasons the government is not barred under the "unclean hands" doctrine from invoking the equitable doctrine of disentitlement.¹⁶

First, the government opines (Br. 46) that "the government's misstatements below" did not "result[] in the judgments in the lower courts." Our own crystal ball is not as clear: surely it is at least as likely as not that the lower courts would have ruled differently had the government conceded, as it now has, that the United States instigated petitioner's arrest by the Swiss. At a minimum, that would seem to be a question for the lower courts to consider should a remand be necessary.

Second, the government argues (Br. 47 n.27) that the "unclean hands" doctrine should not be applied so as to permit "a malefactor * * * to benefit from his inequitable actions." But for the reasons we noted above, petitioner is not a "malefactor" — and certainly not in the sense the government implies. He has *not* "improperly exploited" (Br. 47) the court's discovery process, nor has he committed any of the other "infractions" (Br. 47) that the

¹⁵ Although the Solicitor General has candidly corrected many of the prosecutors' misstatements, several of those misrepresentations remain uncorrected. Thus, for example, the prosecutor failed to make clear at oral argument in the Ninth Circuit that the United States had solicited the Swiss prosecution. To the contrary, he told the court of appeals that the United States had "never made" a request to the Swiss for assistance in the United States prosecution. (A copy of the tape of the oral argument has been lodged with the Clerk by the government).

¹⁶ The government also argues (Br. 44) that the "unclean hands" argument is "not properly before the Court" because it "appeared for the first time in [petitioner's] opening brief on the merits." Of course, it was not until the brief in opposition that the government acknowledged that the United States was actually responsible for the Swiss prosecution, thereby demonstrating the prosecutors' unclean hands. In any event, a petitioner need not argue every point he wishes to make in his petition, so long as the argument is "fairly included" in the question presented. S. Ct. Rule 14.1(a); *Procurier v. Navarette*, 434 U.S. 555, 559-560 n.6 (1978). The government does not suggest that we have failed to meet that standard.

government attributes to him. However the government may wish to characterize petitioner's failure to travel to the United States to attend his criminal trial, in *this* civil forfeiture case he is prepared to defend and to live by the rules in doing so. He should not be disentitled from presenting that defense, least of all by prosecutors who admittedly misled the lower courts in their pursuit of a forfeiture.

* * *

The forfeiture of petitioner's property deprived him, once and for all, of "valuable rights of ownership, including the right of sale, the right of occupancy, the right to unrestricted use and enjoyment, and the right to receive rents." *United States v. James Daniel Good Real Property*, 114 S. Ct. 492, 501 (1993). And the government extinguished those rights, not by establishing probable cause in a courtroom, not by overcoming petitioner's defenses, and not even in compliance with the due process standards for *pre-deprivation seizures*. It did so, instead, by invoking a version of the disentitlement doctrine that bears no discernible kinship with this Court's cases.

The government's forfeiture juggernaut does not need such extra-legal assistance. Particularly in light of "the breadth of new civil forfeiture statutes" (*James Daniel Good*, 114 S. Ct. at 515 (Thomas, J., concurring in part and dissenting in part)), and the "fundamental interdependence * * * between the personal right to liberty and the personal right in property" (*Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972)), there is no reason to extend the supervisory powers of the federal courts this far. The judgment of the court of appeals should be reversed.

Respectfully submitted.

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